

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

REBECCA LOCEY)	
Claimant)	
VS.)	
)	Docket No. 1,054,245
JOSTENS, INC.)	
Respondent)	
AND)	
)	
TRAVELERS PROPERTY CASUALTY CO.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) request review of the May 16, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) Rebecca Sanders.

APPEARANCES

Bruce A. Brumley, of Topeka, Kansas, appeared for the claimant. Vince Burnett, of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing, taken April 29, 2014, with exhibits attached; the Deposition of Pat Do, M.D., taken July 31, 2013, with exhibits attached; the continuation of the Deposition of Dr. Do, taken April 16, 2014; the Deposition of Edward Prostic, M.D., taken April 21, 2014, with exhibits attached and the documents of record filed with the Division.

ISSUES

The ALJ found claimant is entitled to medical care and designated Dr. Daniel Stetchschulte as the authorized treating physician. The ALJ determined the January 11,

2011, work accident accelerated and aggravated claimant's right knee condition to the point where claimant had an immediate need for a right knee replacement.

Respondent requests review of whether claimant's need for right knee replacement surgery is causally related to claimant's January 11, 2011, work accident. Respondent argues the ALJ's Order should be reversed as the greater weight of the evidence establishes claimant's need for a total knee is due to her preexisting, degenerative conditions and not her work-related accident.

Claimant contends the ALJ's Order should be affirmed. Claimant points out that respondent seems to ignore that this case predates the prevailing factor created on May 15, 2011, and that this case is controlled by the standard in *Chinn*¹, which only requires claimant show a worsening, which case law defines as an aggravation, acceleration or intensification. Claimant argues she has done this and therefore is entitled to medical treatment.

FINDINGS OF FACT

As of July 2011, claimant worked for respondent for 36 years. She is claiming injury to her right knee while in the course of her employment with respondent. On January 11, 2011, claimant heard a pop in her right knee after she kicked a mat she was standing on to move it out of her way. The mat was intended to take the pressure off claimant's back while she was standing to work and to ease the pressure from walking back and forth. The mat is located under a table claimant works on and when she walks, the mat moves up and under the machine kind of like a floating floor. Claimant testified that when she reaches for a book to put in her machine, the corner of the mat is in her way and she feels like she is going to trip, so she kicks the mat out of her way. As she did so this time, she felt immediate pain and heard a pop in her right knee. Claimant testified that the mat is heavy and awkward, but she has moved it many times before with her feet and never had any problem.

Claimant testified the pop in her knee was loud, but probably wasn't heard over the running machines. It was only when she yelled that she was heard and supervisors came to her work station to see what was wrong. Claimant testified after she heard her knee pop, she felt instant stinging and a burning pain in her knee and then it began to swell and balloon out. Claimant was able to finish working the rest of the day. She tried to walk it off but the pain remained. The next day she was taken to Dale Garrett, M.D., at the occupational clinic, per company policy. Dr. Garrett examined claimant on January 12, 2011, finding claimant with pain and swelling in her right knee.

¹ *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

Claimant experienced a similar event in February 2010, when she felt moderate pain in her right knee as she was pivoting and twisting with a load of books and felt a pop in her knee. An MRI and x-rays of the knee at that time displayed minimal to mild degenerative changes with tiny joint effusion. Claimant was treated with an injection which provided only temporary relief and pain medication. Claimant testified the pain was aggravated by pivoting, standing, walking quickly and walking up stairs. Rest and medication improved the symptoms. Claimant slowly improved, ultimately being returned to her regular job on April 14, 2010.

After the current accident, claimant continued working with restrictions until mid-July 2011, when the plant shut down. Claimant is 5 ft. 10 in. tall and weighs 318 pounds. At her heaviest she was 348 pounds. Claimant is 65 years old.

Claimant was referred to orthopedic surgeon Bradley T. Poole, M.D., who performed surgery on July 29, 2011, to claimant's right knee. The surgery consisted of a partial medial meniscectomy and a chondroplasty of the lateral plateau, medial condyle and the patellofemoral joint. Claimant continued to experience pain in the knee. Dr. Poole treated claimant with a series of Euflexxa injections which proved less than satisfactory. Claimant was diagnosed with ongoing osteoarthritis and contact dermatitis in the right knee. Dr. Poole referred claimant to Dr. Mumford because he felt she was in need of a knee replacement.

Claimant was examined by orthopedic surgeon Joseph E. Mumford, M.D., on August 22, 2012. Claimant was diagnosed with tricompartmental osteoarthritis of the right knee. It was recommended claimant have a total right knee arthroplasty. In a letter to respondent's attorney dated September 13, 2012, Dr. Mumford opined claimant's accident most likely contributed to the meniscal tear. However, the Grade 3-4 chondromalacia, which he described as an end-stage arthritic disease, was related to the normal process of aging, as well as claimant's weight, which Dr. Mumford recorded at 315 pounds.

Claimant testified her pain in 2010 was bad, but she was able to handle it. No one told her at that time she was in need of a knee replacement. Claimant testified the pain she had in 2011 was much worse than in 2010 and she was not able to do a lot of the things she had been.

Claimant met with Pat Do, M.D., for a court ordered IME on April 1, 2013. Dr. Do noted claimant wants a knee replacement so she can move forward with her life. Claimant wants to be free of the popping and pain in her right knee. Dr. Do reviewed claimant's April 1, 2010, MRI findings, finding them compatible with degenerative changes. Dr. Do felt it was important to note in 2007, claimant had an injection in her left knee with Dr. Stechschulte since she was considered to be too young for knee replacement. She had been receiving these injections prior to 2011. Dr. Do opined that some people are more at risk for wear and tear in their knees than others and sometimes it occurs in both knees.

He testified that kicking a mat would not cause claimant's right knee to be worn down to the bone at that point in time.

Dr. Do's examination of claimant's knees revealed patellofemoral crepitus, no obvious instability to either knee and some diffuse tenderness, more in the medial compartments. X-rays of both knees showed significant wear and tear. Dr. Do diagnosed right knee pain, and degenerative joint disease. He recommended claimant entertain the idea of total knee replacement for both knees. He opined it was reasonable to suggest knee replacement, but he did not feel the work injury where she pushed and kicked the mat would cause her to be bone on bone and did not cause her need for knee a replacement. He stated claimant should consider pursuing knee replacement under commercial insurance.

Dr. Do felt claimant's degenerative condition is age related and her height and weight are also contributing factors. He felt claimant's pain was aggravated by the work injury. However, he testified that there was probably no change in claimant's anatomy as it relates to the degenerative condition. He acknowledged the accident could have affected the meniscus.

Dr. Do was questioned extensively regarding whether claimant's long history of repetitive work could have aggravated her knee condition. He agreed a long history of being on her feet, on a concrete floor, could aggravate her preexisting condition, including the bone-on-bone diagnosis. However, Dr. Do drew a distinction between the claimed injury dates from January 11, 2001, through her last day in July 2011 and a long term exposure over the life of her work with respondent. During his deposition, Dr. Do was presented with a claim letter to respondent representing an injury date including any date in the course of claimant's employment with respondent. He was also presented the K-WC E-1 Application For Hearing (E-1) filed with the Division, identifying a date of accident from January 11, 2011, forward. Dr. Do agreed the longer exposure period would fit more of the aggravation or intensity probability. The shorter six month period would create the possibility of a temporary aggravation only. It was represented by claimant's attorney at Dr. Do's deposition, that an amended E-1 claiming an extended series of accidents, would be filed. However, the Division file contains no such amended application.

Claimant is considered to be obese at 315 pounds and with a BMI of 46. Carrying that much weight places additional stress, wear and tear on joints, particularly the knee joints. This would accelerate arthritic changes and lead to bone on bone in the knee joints.

Claimant's knee was bone on bone before the January 11, 2011, accident. Dr. Do testified that, at most, the accident temporarily aggravated claimant's preexisting symptoms.

Claimant first met with Edward Prostic, M.D., on August 22, 2008, for the injury to her left knee. This injury is a separate claim from the current medical request and will not be discussed herein.

At the request of her attorney, claimant met Dr. Prostic again on November 28, 2012, for evaluation of bilateral knee and shoulder pain. Claimant complained of bilateral knee pain, with the right being more symptomatic than the left; and clicking, popping and weakness in the left shoulder. Claimant reported difficulty standing and walking and raising her hand above shoulder level. As this appeal deals with claimant's request for a right extremity total knee replacement, information dealing with claimant's other maladies will not be discussed.

Dr. Prostic examined claimant and found her to have tenderness anteriorly and medially with the greatest tenderness over the pes anserine bursa of the right knee and worsening of her gait when asked to walk on the forefoot or the heel. Claimant was 5 foot 10 inches tall and weighed 320 pounds.

Dr. Prostic opined claimant sustained injury to her right knee during the course of her employment. Claimant underwent a partial medial meniscectomy and chondroplasty from which she had only temporary and incomplete relief. Dr. Prostic agreed claimant required a total knee replacement arthroplasty. He testified claimant's work-related accident on January 11, 2011, is the prevailing factor in causing the injury to claimant's right knee, the medical condition and the need for medical treatment.

He testified that but for the January 11, 2011, accident, claimant would not be in need of the total knee replacement for the right knee at this time. It accelerated preexisting degenerative changes in the knee.

During his evaluation, Dr. Prostic reviewed the MRI of claimant's right knee dated April 1, 2010. He found only mild abnormal increase in intensity within the internal horn of the meniscus and only minimal thinning of the articular cartilage. This, in his opinion, indicated claimant had a good knee prior to the January 11, 2011, accident. Even the x-rays from June 21, 2011, in his opinion, did not have the appearance consistent with the need for a total knee replacement.

Dr. Prostic determined from that evidence, the torn medial meniscus accelerated the osteoarthritic process in the knee. By November 2012, claimant had significant joint space narrowing and adaptive changes in the knee with progressive malalignment and joint space narrowing. He attributed these progressive changes to the removal of additional meniscus and the resultant weakening of the knee joint.

During cross-examination, Dr. Prostic acknowledged claimant denied prior problems with her right knee. He was also unaware that claimant had been diagnosed with Lupus, a disease form of arthritis which can also lead to the destruction of the knees. However,

even under strong cross-examination, Dr. Prostic consistently testified that the tearing and weakening of the meniscus was a key causative factor in the development of the need for a total knee replacement in claimant's right knee.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2010 Supp. 44-501(a) states:

(a) If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2010 Supp. 44-508(e) states:

(e) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

It is undisputed claimant suffered a work-related accident on January 11, 2011, when she kicked the floor mat. The torn meniscus resulted from that accident and claimant underwent surgery to repair that damage. However, claimant has also developed the need for a total knee replacement in her right knee. The medical evidence conflicts regarding whether this medical need stems from the accident or from claimant's excessive weight over many years. Dr. Mumford is adamant that claimant's need for the total knee replacement stems from her aging and weight.

Dr. Do qualifies his opinion on the need for the surgery with the time period being considered. He found the accident and subsequent work leading to her lay-off in July 2011 to be insufficient to cause or permanently aggravate claimant's knee justifying the surgery. He acknowledged claimant's long history of work for respondent, standing on concrete floors, would be sufficient to aggravate or accelerate the need for the knee replacement surgery. However, no claim has been filed covering that extensive work period. At best, he determined the accident and short work period resulted in only a temporary increase in claimant's pain complaints, with no resulting anatomical change.

Dr. Prostic is just as adamant that the accident and resulting surgery on claimant's torn meniscus accelerated the need for the knee replacement. He justifies his opinion with his review of the MRI and x-ray tests performed on claimant's knee in 2010, with the earlier injury. The record does support his analysis of a significantly improved knee in 2010 over that displayed by claimant in 2012.

As the parties know, the Kansas Workers Compensation Act (Act) was significantly modified effective May 15, 2011. Those modifications have made it more difficult for a worker to receive medical treatment for conditions which have developed over years of labor. However, those restrictions were not in effect at the time of claimant's January 11, 2011, accident. The law in effect at that time is much more liberal in the treatment allowed for work related conditions.

In general, the question of whether the worsening of a claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether the claimant's subsequent work activity aggravated, accelerated or intensified the underlying disease or affliction.²

This Board Member finds, under the more liberal legal analysis in effect in January 2011, that claimant has suffered an aggravation and acceleration of her degenerative knee condition, resulting in the need for the total knee replacement. As such, the award of the medical treatment by the ALJ is justified and the Order affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant has satisfied her burden of proving her need for the total knee replacement in her right knee resulted from the accident on January 11, 2011, which arose out of and in the course of her employment with respondent.

² *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, rev. denied 265 Kan. 884 (1998).

³ K.S.A. 2013 Supp. 44-534a.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Rebecca Sanders dated May 16, 2014, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July, 2014.

HONORABLE GARY M. KORTE
BOARD MEMBER

c: Bruce A. Brumley, Attorney for Claimant
bruce@brucebrumleylaw.com
johnna@brucebrumleylaw.com
tara@brucebrumleylaw.com

Vince Burnett, Attorney for Respondent and its Insurance Carrier
vburnett@McDonaldTinker.com

Rebecca Sanders, Administrative Law Judge